VALIDITY OF STATUTES REGULATING THE SALE AND POSSESSION OF GAME.—The recent case of *In re Deininger*, 108 Fed. 623 (Oregon, April, 1901), raises again the question of the validity of statutes prohibiting the sale or possession of game of certain kinds.

Statutes of this kind may be divided into two classes, viz.: (1) those prohibiting the sale or possession of game for the purpose of transporting it beyond the limits of the State; (2) those prohibiting the sale or possession of game without regard to the purpose of the owner or to the place where it may have been captured. The validity of the first class of statutes was finally settled in the leading case of *Geer* v. *Conn.*, 161 U. S. 519 (1895). As to the second class the decisions of the State courts and of the lower Federal courts are irreconcilable and, as yet, the question has not been decided by the Supreme Court. The confusion upon this whole subject seems to be due to a failure to discriminate property in game from other kinds of property. The right to capture game seems always to have been subject to legislative control for the reason that all game is owned in common by all the people and held in trust for them by the state, so that while an individual may reduce it to possession, by that very act he subjects himself to the power of the legislature to regulate the use to which it may be put. 2 Blackstone's Com. 533, Chase's ed. 1890. In the absence of constitutional restrictions, each State may pass any law regulating the use and possession of game.

The validity of such a law, however, has been questioned on the ground that the owner is deprived of his property without "due process of law," and that it is a regulation of interstate commerce by the State. To the first objection the answer is that game "is not the subject of private ownership except in so far as the people may elect to make it so." *Ex parte Maier*, 103 Cal. 476, 483 (1894); *Geer* v. *Conn.*, *supra*; *State* v. *Rodman*, 58 Minn. 393 (1894). As to the second objection, it was said in the Geer case that the very notion of "common ownership imparts the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose," and that game cannot become the subject of interstate commerce except with the State's consent. It seems to be well settled that laws prohibiting the possession of game during the closed season, or at any time for the purpose of transporting it beyond the limits of the State, are valid.

Different considerations arise in the second class of statutes, an example of which is involved *In re Deininger*, *supra*. In that case the law was declared valid and held to apply to game lawfully captured outside the State. It does not necessarily follow that since a State, owing to the qualified ownership in game, may prohibit the exportation of game, it may prohibit the possession of it when brought from another State. It seems, however, that such statutes may be upheld as police regulations to protect domestic game, although interstate commerce be incidentally affected. In one of the leading State decisions on this point, it was said that the fact that the game "was either killed within the lawful period or brought

from another State where the killing was lawful" was no defense, and the statute was declared to be a valid police regulation. *Phelps* v. *Racey*, 60 N. Y. 10 (1875). The latter case is said to have been overruled by *People* v. *Buffalo Fish Co.*, 164 N. Y. 93 (1900), but the only point upon which a majority of the court agreed was that the legislature did not intend the statute to apply to foreign game. Portions of the opinion referring to *Phelps* v. *Racey* are *dicta*. A number of State decisions are in accord with *Phelps* v. *Racey*, *supra*. *Ex parte Maier*, *supra*; *State* v. *Rodman*, *supra*; *Magner* v. *People*, 97 Ill. 320 (1881); *State* v. *Farrell*, 23 Mo. App. 176 (1886).

There are very few decisions of Federal courts on this point. *In re Davenport*, 102 Fed. 540 (1900), a result was reached exactly opposed to that in *In re Deininger*, *supra*, the statute being declared unconstitutional as regulating interstate commerce. Though the question has never been squarely presented to the Supreme Court, it may reasonably be inferred that that court would uphold such statutes. In the *Geer* case, *supra*, it was said, p. 534: "The right to preserve game flows from the undoubted existence in the State of a police power to that end, which may be none the less efficiently called into play because by so doing interstate commerce may be remotely and indirectly effected." While this statement was made with reference to that particular case, the court referred with marked approval to *Ex parte Maier*, *supra*, and similar State decisions, and expressly disapproved of decisions to the contrary. It would seem that the prohibition against the importation of game is quite as great a protection to domestic game as the prohibition against exportation, since the cover for fraud and the illegal capture of game within the State is removed. This argument, however, was expressly rejected by three of the judges in *People* v. *Buffalo Fish Co.*, *supra*.

What bearing the "original package" decisions have upon this subject has never been decided. Indeed, the point seems never to have been raised, nor is it clear what would be an "original package" of game. A recent Act of Congress provides that all dead game, the importation of which into any state is prohibited, shall, upon arriving in such State, be "subject to the operation and effect of the laws of such State or territory enacted in the exercise of its police power to the same extent and in the same manner as though such animals or birds had been produced in such State or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." U. S. Stat. at Large, Vol. 31, chap. 553, secs. 3 and 5, pp. 187–188, May, 1900. The validity and construction of this act have not yet been brought before the Supreme Court. What effect it will have upon this much confused subject remains to be seen.

---

REVOCATION OF LICENSE TO WHARF OUT.—The Circuit Court for the Southern District of Alabama, has decided in the case of *Sullivan Timber Co.* v. *City of Mobile*, 110 Fed. 186 (Oct. 1901), that though a littoral owner has as such no right to wharf out, yet if, with the permission of the city, in which the title